TOPICAL INDEX

PAGE

The interest of amicus curiae 1

Argument 2

I.

The discharge of petitioner violates the freedom of the press guarantee of the First Amendment as incorporated in the Fourteenth, and also offends against procedural due process under the Fourteenth Amendment 2

Conclusion 10

TABLE OF AUTHORITIES CITED

CASES

Hayman v. Los Angeles, 17 Cal. App. 2d 674, 62 P. 2d 1047 ..... 5, 8, 9

M. T. A. v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684, 355 P. 2d 905 5

Nelson v. County of Los Angeles, 362 U. S. 11 7

Slochower v. Board of Higher Education, 350 U. S. 1 7

United Public Workers v. Mitchell, 330 U. S. 75 3

Wieman v. Updegraff, 344 U. S. 183 4

RULES

Rules of the California Civil Service Commission, Rule 8, Sec. 2(i) 7

Rules of the United States Supreme Court, Rule 42(1) 1

STATUTES

United States Constitution, First Amendment 1, 5, 10

United States Constitution, Fourteenth Amendment 1, 3

IN THE

Supreme Court of the United States

October Term, 1960
No. 913

EDWARD PRANGER,

Petitioner,

vs.

S. WESLEY BREAK, *et al.*

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

The Interest of Amicus Curiae.

This brief is being filed by the American Civil Liberties Union of Southern California, pursuant to Rule 42(1) of this Court, with the consent of the parties, in support of the petition for writ of certiorari.

An analysis of the Record herein has brought *amicus curiae* to the conclusion that the discharge of petitioner invaded freedom of the press, as guaranteed by the First Amendment to the United States Constitution as absorbed in the Fourteenth Amendment, and that the action of respondents is so serious an abridgment of so precious a right as to warrant review by this Court.

ARGUMENT.

I.

The Discharge of Petitioner Violates the Freedom of the Press Guarantee of the First Amendment as Incorporated in the Fourteenth, and Also Offends Against Procedural Due Process Under the Fourteenth Amendment.

This case involves the basic right of free political criticism and protest by an ordinary functionary in one of our state civil service systems. Such outspokenness provoked a species of high-handed reprisal by the hiring authority against the dissenter which by threatening his status, employment rights, and future subsistence evinced certainly all the repressive impact of the ordinary penal sanction. Hence, though it is barren to quibble over the apt characterization of certain official deprivation—*i.e.*, whether technically constituting punishment for juridical purposes—from the pragmatic standpoint of the administrator in achieving ideological conformity on the issues of local, and eminently "practical" politics, that really determine the quality and level of his "bargaining" opposition among the myraid officeholders; the weapon of termination of tenure of an offending malcontent leaves nothing to be desired in its stringency. Unquestionably the particular issues forming the matrix of this dispute, cut deep economically and lie close to the central concerns of the governing officials and personnel managers. But all this description concedes is that the utterances sought to be protected were challenging and meaningful rather than trivial and banal, which of course is characteristic of any advocacy or political expression that succeeds in goading officialdom into retaliating by the infliction of

job loss, demotion, or withdrawal of the customary perquisites or emoluments.

Clearly some federal constitutional protection of minority political rights of aggrieved state civil servants must be available under the provenance of the Fourteenth Amendment. Though the retention of public office is not under the American view analogous to a vested property interest in the sense that its deprivation need be attended with all the historic safeguards implicit in "due process," yet this Court has more than once announced that rights stemming from public hire, in all reaches of American government, cannot be arbitrarily or discriminatorily impaired or abrogated. (*United Public Workers v. Mitchell*, 330 U. S. 75. Any order of removal or infliction of status change suffered at the hands of the hiring agency or its surrogate must, in last analysis, be grounded on the existence of a rational nexus between the continued special hazard, burden or inconvenience of incumbency and the well-recognized and established goals of public service. In order not to do violence to sacred human rights under the Fourteenth Amendment, disabilities officially visited on our public servants must pass muster as being functionally defensible in the most comprehensive view one can adopt of the end objectives of any progressively organized corps of public administration. Such edicts curtailing an individual employee's position, welfare, or relative standing in governmental employment can never endure judicial scrutiny if in actuality the product of caprice, racial bigotry, or the inflamed spleen of some nettled superior. We have been authoritatively advised that dismissals from the civil service solely on the basis

that persons were Jews, Catholics, or of any particular pigmentation would quickly be found wanting both in constitutional equal protection and procedural due process. (*Wieman v. Updegraff*, 344 U. S. 183.) The present instance of punitive dismissal based on the aggrieved employee's espousal of certain techniques of organized labor as a desirable means of dramatizing the sorry economic lot of the County civil servants, clamors for some definition of the protected sphere of political and organized worker activity that the hiring governmental body must respect. So far, abysmally few cases—proceeding on a wholly civil libertarian plane—have essayed, in the discharge cases, to carve out any such ambit of constitutionally inviolate proselyting or organizational promotion. Aside from the perennially active and pervasive loyalty-oath controversies and the few federal appellate cases appraising the validity of the procedural machinery and criteria for "security" dismissals and transfers, there is a dearth of federal constitutional decisional literature on what restrictions and inhibitions may rightly be imposed on civil servants, generally, respecting their support and open sponsorship of unionism among the government clerks and the bargaining devices legitimately useable against those persons and agencies within the same sovereignty vested with the power of decision over the questions of wage scales and conditions of labor. What traditional-type pressures and agitation borrowed from the industrial sector can be validly adopted? Certainly in the absence of any broad legislative proscription of strikes against civic or public bodies or agencies, the question in California remains open and merits the most intense

and protracted consideration. (*Cf. M. T. A. v. Brotherhood of Railroad Trainmen*, 54 Cal. 2d 684, 355 P. 2d 905; with *Hayman v. Los Angeles*, 17 Cal. App. 2d 674, 62 P. 2d 1047.)

Certainly mere cantankerousness and contentiousness expressed in a wholly proper forum—such as in the employees' newsletter made use of herein—will hardly suffice to justify any sanction nor will other personal idosyncrasies bearing no genuine relation to the "efficiency and probity" of public service. On the other hand, it is an open question whether it is realistic to urge transplanting of the exacting and essentially criminal-law type demands of the venerable "clear and present danger" test to the administrative determination of the limits of employee advocacy and free speech. Granted that a civil servant has in no sense been stripped or automatically divested of all the usual cluster of constitutional rights of protest enjoyed by the private citizen, by what touchstone do we determine when a particular public employee has by his militancy in behalf of normal American union behavioral patterns overstepped the bounds of propriety imposed by his uniquely sensitive position in society, and posed sufficient risk of dissension and loss of morale amongst his body of fellow-workers to warrant his removal or other form of discipline? If it be conceded that these persons dependent solely on public institutions and governmental agencies for their livelihood—comprising, we know, a fairly substantial percentage of the country's total labor force—carry over into their public careers any meaningful vestige of First Amendment protection, then their utterances about matters related to their economic

plight and measures appropriate to its solution must be accorded a large measure of tolerance, no matter how inflammatory and pernicious these views may seem to officialdom.

Petitioner herein had a serious grievance against the Board of Supervisors, who, *ex officio,* comprised his immediate employing body, the Air Pollution Control Board. He was alarmed at the prevailing wage scale established by the Board and gravely disappointed that, for the first time in recent years, the Board had failed to increase wages of County employees to meet the cost of living increase. The marked disparity that abounded in all segments of private employment as to adequacy of recompense and that begrudged to his fellow-workers under the current wage policy set by the Board of Supervisors seemed utterly lacking in justice, equal sacrifice, and budgetary need. Feeling the need of initiating or at least proposing some form of group employee remonstrance against this invidious-seeming discrimination and gratuitous hardship, he made use of the best and only forum and sounding-board open to him: the editorial page of the San Bernardino County Union Employee newsletter of which he was associate editor. The views he advanced in this publication were as follows:

> ". . . we are orphans in a spiralling economic tornado.
>
> For the first time in recent years, our Board of Supervisors has lent a deaf ear to the economic facts of life, at least when it comes to the need of the employees who administer the government they supposedly supervise.

> Is there a remedy to this situation? Perhaps, but the medicine is bitter. It calls for varied applications of lawsuit, slowdown, sitdown, walkout —or that final bitter dose: the strike. Whatever antidote is prescribed, it can only be attained through the media of strong unionism." (Opinion of the Court below, p. 4, Appendix to Petition.)

Petitioner's status was that of a Clerk IV in the County Civil Service, having attained the assumed security of permanent tenure.*. Hence, he was entitled to have certain procedural rights accorded him in any official challenge made to his continued fitness to serve. One of these, that would seem to have been neglected in petitioner's case, with, in view of the "free speech" precedent an unfortunate after-effect of mass restraint on protected expression, was the right to specificity and particularization of charge and findings by the Civil Service Commission: a precise pin-pointing of the "philosophy" and attitudes that were administratively determined "to demonstrate a lack of the essential loyalty, mature judgment, and the proper spirit of cooperation so vital to good government in this County." (Opinion of Dec. 30, 1958 of the Civil Service Commission of San Bernardino County.) The formal ground for dismissal invoked by the Board of Supervisors and sustained by both the Civil Service Commission and the District Court of Appeal was that of "conduct unbecoming an employee." (Rule 8, §2(f).) The vacuous generality of this accusation was lent some

*In this respect, his status was that of Nelson (not Globe) [*Nelson v. County of Los Angeles*, 362 U. S. 1], and Slochower [*Slochower v. Board of Higher Education*, 350 U. S. 1].

content, albeit of a multifarious nature, in the discharge letter of August 21, 1958, as stemming from (a) petitioner's comportment at a Rialto City Council meeting and (b) the "philosophy" expressed in the above-quoted editorial. As to the latter ground, no further specification was ever vouchsafed to petitioner as to which of the several independent rhetorical assertions made in the subject editorial was deemed "inimical to public service". By a close reading of the affirming opinion of the District Court of Appeal it is evident that the implied advocacy of the right of civil servants to strike was the unpalatable constituent of the published statement, though there is no warrant whatsoever in the Civil Service Commission record for isolating this particular idea. Ground (a) relating to supposed improprieties committed at the Rialto City Council meeting was disregarded by the Commission in its final opinon and was considered inessential to judgment by the District Court of Appeal. Neither the County Civil Service Commission nor the reviewing courts detected any conceivable infringement of petitioner's civil liberties by virtue of the discharge but both tribunals couched the dispositive question in terms of the quality of judgment and sense of group loyalty displayed by petitioner "as a public employee in a sensitive governmental office. . . ." By citing and quoting extensively from an earlier discharge appeal, the California District Court of Appeal elucidated beyond peradventure of doubt the policy rationale it felt legitimated petitioner's removal. "Petitioner's activities had a tendency to create dissention and unrest among the county employees and to interfere with the enforcement of reasonable rules of conduct. . . ." *(Hayman v. City of Los*

Angeles, 17 Cal. App. 2d 674, 62 P. 2d 1047). The District Court of Appeal explicitly disavows awareness of a freedom of speech issue, and disclaims any obligation to explore the attending circumstances of the publication and the contextual impact of the writing to ascertain whether the risk to governmental efficiency and morale was truly imminent and substantial enough to justify the drastic curtailment of expression that necessarily occurred. It waives aside any defense contention that the editorial discussion was merely doctrinaire, or that an intent to exhort fellow-workers to such discountenanced tactics was never seriously entertained. To the District Court of Appeal, the petitioner's language was sufficiently interpretable as a personal approval of resort to the drastic remedy described, and this permissible impression of the article "could reasonably be found to engender distrust in the public mind as to the loyalty and integrity of public officers and employees generally."

The profound and far-reaching question which seeks ultimate and authoritative resolution here is whether a civil servant may, with impunity, in publicly proclaiming his considered viewpoints on the solution of problems common to his class of workers, utter the same sort of disturbing, unpopular, even shocking ideas which are traditionally accorded constitutional protection with reference to the threatened imposition of penal or other sanctions. On the other hand, must he studiously avoid in his political or group activity every potentially controversial or "impolitic" area of discourse, no matter how deeply engrained his sentiments. Free speech of the latter variety is so attenuated and

diffident that one hesitates to assimilate it in any way to the virile breed of the First Amendment: if utterances by a public employee must on all burning topics be so anemic and guarded, better to acknowledge that public life exacts a forfeit in certain important realms of public debate of the normal and salutary protections for personal expression and advocacy. Is the interest in an outward facade of unctuous conformity and regimentation so weighty as to demand the relegation to inferior citizenship of all those coming on the public payroll?

Conclusion.

The Court, by the grant of certiorari herein, should give answers to the profound and far reaching question raised by the petition.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for American Civil Liberties Union of Southern California, Amicus Curiae.

WARREN P. HILL,
Of Counsel.